

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Plaintiff filed a Complaint on January 22, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of his application for supplemental security income ("SSI"). On February 13, 2007, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on October 10, 2007, in which: Plaintiff seeks an order reversing the Commissioner's decision denying benefits and directing the payment of benefits or, alternatively, remanding the

1 case for a new hearing; and Defendant requests that the Commissioner's
2 decision be affirmed. The Court has taken the parties' Joint
3 Stipulation under submission without oral argument.

4
5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**
6

7 Plaintiff's grandmother filed an application for SSI on behalf of
8 Plaintiff on December 1, 1991, alleging disability due to asthma and
9 borderline intellectual functioning. (Administrative Record ("A.R.")
10 151-56.) Plaintiff received childhood disability benefits until those
11 benefits were terminated in August 2000. (A.R. 160.) The Commissioner
12 denied reconsideration of the benefit termination on November 9, 2001.
13 (A.R. 165-67.) On May 15, 2003, Administrative Law Judge Samuel W.
14 Warner ("ALJ Warner") found that Plaintiff was not under a disability
15 since his date of cessation. (A.R. 397.)
16

17 Plaintiff then filed a new application for SSI on September 24,
18 2003, again alleging disability due to asthma and borderline
19 intellectual functioning. (A.R. 427-34.) He has no past relevant work
20 experience. (A.R. 35.)
21

22 The Commissioner denied Plaintiff's claim for benefits initially
23 and upon reconsideration. (A.R. 400-03, 27-36.) On January 3, and
24 April 14, 2005, Plaintiff, who was represented by counsel, testified at
25 hearings before Administrative Law Judge James Moser ("ALJ"). (A.R.
26 738-43, 744-69.) No medical expert testified. (*Id.*)
27

28 On July 21, 2005, the ALJ concluded that "the evidence does not

1 establish that 'changed circumstances' exist since ALJ Warner's May 13
2 [sic], 2003 decision," and denied Plaintiff's request for SSI. (A.R. 27-
3 36.) The Appeals Council subsequently denied Plaintiff's request for
4 review of the ALJ's decision. (A.R. 9-11.)

5
6 **SUMMARY OF ADMINISTRATIVE DECISION**
7

8 In his July 21, 2005 written decision, the ALJ found that Plaintiff
9 has not engaged in substantial gainful activity since the alleged onset
10 of his disability. (A.R. 35.) The ALJ further found that Plaintiff's
11 asthma and borderline intellectual functioning are "severe" under the
12 regulations.² (*Id.*) The ALJ also found that neither of Plaintiff's
13 impairments, individually or in combination, is listed as or medically
14 equivalent to a listed impairment. (*Id.*)

15
16 Assessing Plaintiff's residual functional capacity, the ALJ found
17 that Plaintiff can: lift and carry 50 pounds occasionally and 25 pounds
18 frequently; stand, walk, and sit for six hours in an eight hour day;
19 perform unlimited pushing and pulling of hand and foot controls; perform
20 simple repetitive tasks with no limitation on the ability to maintain
21 concentration, persistence, or pace; relate to others and adapt to a
22 work environment. (A.R. 35.) The ALJ found that Plaintiff has a
23 moderately limited ability to understand, remember, and carry out
24 detailed instructions, and he must avoid fumes, odors, dust, gases, and
25 poor ventilation. (*Id.*) Based on this assessment, as well as

26
27 ² Plaintiff also alleges disability due to right thumb stiffness
28 status post fracture, back pain, and depression. However, the ALJ found
that the record does not support a finding that these impairments are
"severe." (A.R. 29.)

1 Plaintiff's classification as a younger individual with a limited
2 education and no vocationally relevant work experience, the ALJ found
3 that jobs Plaintiff can perform exist in significant numbers in the
4 national economy. (A.R. 36.) Accordingly, the ALJ concluded that
5 Plaintiff was not disabled during the time period at issue. (*Id.*)

6 7 STANDARD OF REVIEW

8
9 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
10 decision to determine whether it is free from legal error and supported
11 by substantial evidence in the record as a whole. Orn v. Astrue, 495
12 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
13 evidence as a reasonable mind might accept as adequate to support a
14 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
15 a mere scintilla but not necessarily a preponderance." Connett v.
16 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the
17 record can constitute substantial evidence, only those "'reasonably
18 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d
19 1063, 1066 (9th Cir. 2006)(citation omitted).

20
21 Although this Court cannot substitute its discretion for that of
22 the Commissioner, the Court nonetheless must review the record as a
23 whole, "weighing both the evidence that supports and the evidence that
24 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
25 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
26 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
27 responsible for determining credibility, resolving conflicts in medical
28 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d

1 1035, 1039-40 (9th Cir. 1995).

2
3 The Court will uphold the Commissioner's decision when the evidence
4 is susceptible to more than one rational interpretation. Burch v.
5 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
6 review only the reasons stated by the ALJ in his decision "and may not
7 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
8 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
9 the Commissioner's decision if it is based on harmless error, which
10 exists only when it is "clear from the record that an ALJ's error was
11 'inconsequential to the ultimate nondisability determination.'" Robbins
12 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v.
13 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400
14 F.3d at 679.

15 16 DISCUSSION

17
18 Plaintiff alleges the following two issues: (1) the ALJ failed to
19 consider properly the environmental limitations afflicting Plaintiff;
20 and (2) the ALJ failed to consider properly the borderline intellectual
21 functioning afflicting Plaintiff. (Joint Stipulation ("Joint Stip.") at
22 3-4.)

23 24 **A. The ALJ Failed To Develop The Record Adequately Regarding** 25 **Plaintiff's Asthma.**

26
27 Plaintiff's December 1, 1991 application for childhood SSI benefits
28 alleged disability based on asthma and borderline intellectual

1 functioning. (A.R. 151-56.) On May 15, 2003, in an unappealed
2 decision, an ALJ found that Plaintiff was not under a disability. (A.R.
3 397.) This determination created a rebuttable presumption of continuing
4 non-disability through the date of Plaintiff's current September 24,
5 2003 application, which again alleges disability based on asthma and
6 borderline intellectual functioning. (A.R. 430.)

7
8 Although applied less rigidly to administrative than to judicial
9 proceedings, the principles of res judicata nevertheless apply to
10 administrative decisions. See Lester v. Chater, 81 F.3d 821, 827 (9th
11 Cir. 1995); Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988); see also
12 20 C.F.R. §§ 416.1405, 416.1421 (initial and reconsideration
13 determinations binding unless appealed or revised). A final
14 determination that a claimant is not disabled also creates a presumption
15 that the claimant retains the ability to work after the date of the
16 prior administrative decision. See Schneider v. Comm'r of Soc. Sec.
17 Admin., 223 F.3d 968, 973 (9th Cir. 2000); Lyle v. Sec'y of Health and
18 Human Servs., 700 F.2d 566, 567 (9th Cir. 1983). This presumption of
19 "continuing non-disability" may be overcome by a showing of "changed
20 circumstances." See Lester, 81 F.3d at 827-828; Chavez, 844 F.2d at
21 693.

22
23 If a claimant does not meet his burden to adduce "proof of change"
24 in his medical condition or other "changed circumstances," such as a new
25 medically-determinable impairment, the Commissioner is not obliged to
26 make a "de novo" determination of non-disability, even when the burden
27 of establishing disability otherwise would fall to the Commissioner.
28 See Booz v. Sec'y of Health and Human Servs., 734 F.2d 1378, 1379-80

1 (9th Cir. 1984)(holding that the burden to prove disability remained
2 with the claimant and did not shift to the Commissioner at step five, as
3 it normally does, because the unappealed denial of the claimant's
4 earlier application created a presumption of non-disability that must be
5 overcome by the claimant's showing of changed circumstances, and where
6 the ALJ permissibly concluded the claimant had produced no reliable
7 medical evidence that he was disabled, the claimant had not met that
8 burden); Lyle, 700 F.2d at 568-569 (holding that when the second ALJ
9 properly determined the claimant had presented no evidence of change to
10 overcome the presumption that his ability to do light work persisted,
11 the "absence of proof of change" was enough to meet the Secretary's
12 burden to show the claimant could perform alternative work; the
13 Secretary was not required "again [to] meet his burden de novo").

14
15 Thus, to overcome the presumption of non-disability arising from
16 the May 15, 2003 decision, Plaintiff has the burden of proving "changed
17 circumstances." By failing to offer proof of such changed
18 circumstances, Plaintiff has fallen short of rebutting the presumption.

19
20 However, in Social Security cases, the ALJ has a duty to fully and
21 fairly develop the record. Tonapetyan v. Halter, 242 F.3d 1144, 1150
22 (9th Cir. 2001)(citing Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir.
23 1996)); see also 20 C.F.R. § 416.1444 (at the administrative hearing,
24 the ALJ "looks fully into the issues"). This is true even when the
25 claimant is represented by counsel. Brown v. Heckler, 713 F.2d 441,
26 442-43 (9th Cir. 1993). The ALJ's duty to develop the record extends
27 from the basic premise that Social Security hearings are not adversarial
28 in nature. Orcutt v. Barnhart, 2005 WL 2387702, *3 (C.D. Cal. 2005);

1 see also Sims v. Apfel, 530 U.S. 103, 110-11 (2000) ("It is the ALJ's
2 duty to investigate the facts and develop the arguments both for and
3 against granting benefits.").

4
5 In this case, there is a gap in the evidentiary record with respect
6 to Plaintiff's continuing treatment with Steven Feig, M.D. Although Dr.
7 Feig indicates in his Residual Functional Capacity Assessment Form that
8 he has been Plaintiff's treating physician since birth and saw Plaintiff
9 five times in the period from December 2004, to May 2005 (A.R. 727), the
10 most recent of Dr. Feig's medical records in the administrative record
11 is from October 17, 2003 (A.R. 485-684). It is well-settled that the
12 most recent medical records are the most probative in cases where the
13 claimant's condition is or may be progressively deteriorating. Stone v.
14 Heckler, 761 F.2d 530, 532 (9th Cir. 1985)(holding that earlier medical
15 evaluations do not constitute substantial evidence for rejecting
16 treating physician's subsequent and more current opinion when claimant's
17 condition is degenerative); Magallanes v. Bowen, 881 F.2d 747, 755 (9th
18 Cir. 1989)("Where a claimant's condition becomes progressively worse,
19 medical reports from an early phase of the disease are likely to be less
20 probative than later reports.").

21
22 To fully assess Plaintiff's ability to engage in substantial
23 gainful activity and to determine whether Plaintiff's medical condition
24 has changed, his treating physician's records should be reviewed. The
25 ALJ made no effort to obtain these medical records and, thereby, to
26 ascertain the current extent of Plaintiff's asthma. As a result, the
27 ALJ failed to fully and fairly develop the record. See Higbee v.
28 Sullivan, 975 F.2d 558, 561-62 (9th Cir. 1991)(remanding case in order

1 to develop the record); McAllister v. Sullivan, 888 F.2d 599, 603 (9th
2 Cir. 1989)(remand appropriate to remedy defects in the record). Without
3 these additional records, it is not clear whether there are changed
4 circumstances relating to the work limitations imposed by Plaintiff's
5 asthma.

6
7 Accordingly, remand for further development of the record is
8 needed.

9
10 **B. Reconsideration Of Plaintiff's Mental Impairment Is Precluded By**
11 **Res Judicata.**

12
13 Plaintiff also contends that the ALJ failed to consider properly
14 the borderline intellectual functioning afflicting Plaintiff, thereby
15 committing legal error. (Joint Stip. at 4.) As discussed above, the
16 May 15, 2003 decision creates a presumption of continuing non-disability
17 that can be rebutted only by evidence of changed circumstances. See
18 Lester, 81 F.3d at 827-28; Chavez, 844 F.2d at 693. Plaintiff has
19 failed to demonstrate that his intellectual functioning has changed
20 materially since the May 15, 2003 decision. (Joint Stip. at 20.)

21
22 Again, Plaintiff has the burden of proving that his circumstances
23 have changed. See Booz, 734 F.2d at 1379-80. By failing to present
24 sufficient evidence that the severity of Plaintiff's mental impairment
25 has increased, a previously unconsidered impairment existed, or the
26 criteria for determining disability had changed (see Acquiescence Ruling
27 97-4(9)), Plaintiff failed to meet his burden. Accordingly, no further
28 consideration of Plaintiff's mental impairment is necessary.

1 **C. Remand Is Required.**

2
3 Here, remand is appropriate to allow the ALJ the opportunity to
4 develop the record regarding Plaintiff's asthma. See, e.g., Benecke v.
5 Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for further
6 proceedings is appropriate if enhancement of the record would be
7 useful); McAllister, 888 F.2d at 603 (remand appropriate to remedy
8 defects in the record).

9
10 **CONCLUSION**

11
12 Accordingly, for the reasons stated above, the Commissioner's
13 decision is REVERSED, and this case is REMANDED for further proceedings
14 consistent with this Memorandum Opinion and Order. Judgment shall be
15 entered reversing the decision of the Commissioner, and remanding the
16 matter for further administrative action consistent with this Memorandum
17 Opinion and Order.

18
19 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
20 copies of this Memorandum Opinion and Order and the Judgment on counsel
21 for Plaintiff and for Defendant.

22
23 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

24
25 DATED: December 30, 2008

26 _____/s/
27 MARGARET A. NAGLE
28 UNITED STATES MAGISTRATE JUDGE